No. 14365

United States Court of Appeals
For the Ninth Circuit

W. J. EARHART, *Appellant*,

— VS. —

ALFRED J. CALLAN, JR., Trustee in Bankruptcy of the Estate of FELIX IVAN PUGH, Bankrupt, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JOSEPH A. BARRECA,
Attorney for Appellee.

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BRIEF OF APPELLEE

STATEMENT OF FACTS

Felix Ivan Pugh operated a farm in Kent, Washington, and he needed alfalfa hay to feed his cattle in the fall and winter of 1953 and having financed purchase of hay for the previous years with Mr. W. J. Earhart, agent for the landlord on the farm, Mr. Pugh went to Mr. Earhart (R. 21) who again agreed to finance Mr. Pugh in a transaction which would put Mr. Pugh in possession of hay for the 1953-54 feeding season (R. 39 and 40). Relying upon that conversation, Mr. Pugh bought approximately fifty-four tons of hay at Sunnyside, Washington, and gave a check in the sum of $1,200.00 to Mr. Walters, the vendor of said hay, thinking that Mr. Earhart would advance enough funds to cover the check at the First-

National Bank of Enumclaw (R. 22, 41 and 57) and proceeded to make arrangements for the hauling of said hay (R. 25). Mr. Earhart decided to pay for the hay by offering his check in the sum of $1,200.00 to the National Bank of Enumclaw (R. 41) and upon being advised that the bank would not accept the check, W. J. Earhart wrote another check for $1,200.00 to Harry S. Walters, the vendor (Exhibits No. 4 and 5, R. 65).

Mr. Earhart's money satisfied Mr. Pugh's obligation to Mr. Walters for the hay. Mr. Pugh realized that he owed W. J. Earhart the price of the hay and the cost of hauling the same, so along with the listing of W. J. Earhart as an unsecured creditor for previous cash loans in the sum of $850.00, Mr. Pugh, on the date of the filing of his voluntary petition to be adjudicated Bankrupt, listed in Schedule A-3 an account owing to W. J. Earhart for the year 1953 as an undisputed open account for hay in the sum of $1,540.00.

After date of Bankruptcy, which was October 14, 1953 (R. 5) W. J. Earhart sought to obtain some written acknowledgment on the part of the Bankrupt regarding title to said hay and did so on October 16th, two days after Bankruptcy, under rather odd circumstances (R. 15 and 16).

ARGUMENT AND AUTHORITIES

I.

The Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous.

In the instant case, the Referee's Findings of Fact and Conclusions of Law were affirmed by the District Court. Above the actual Order Affirming the Referee's decision on review after recitation to the fact that the Court had been fully advised in the premises, the statement is made that the findings of fact (as made by the Referee) are supported by the full record and transcript of proceedings and testimony, and that the conclusions of law are not shown to be in any way erroneous (R. 66).

In the case of the *Morris Plan Industrial Bank v. Henderson* (C.C.A. 2, 1942) 131 F.(2d) 975, Judge Learned Hand states:

> "General order 47 requires the Judge to 'accept his' [the Referee's] 'Findings of Fact unless clearly erroneous.' These are the same words used in Rule 53(e)(2) and substantially the same as those in Rule 52(a) which requires us not 'to set aside' the Findings of a Judge unless it too is 'clearly erroneous' * * *. In the end, as we have often said, the responsibility for the right conclusion remains the Judge's as indeed it does ours [citations omitted] but we have again and again held that except in plain cases, he should accept the Referee's Findings [citations omitted]. We, therefore, hold that the question is the same in this Court as it was in the District Court."

In this connection, see also *Mergenthaler v. Dailey* (C.C.A. 2, 1943) 136 F.(2d) 182, wherein Circuit Court Judge Charles E. Clark says:

> "We have the same duty as the District Court to accept the Referee's Findings unless they are clearly erroneous."

The trial court was, in fact, the Bankruptcy Court wherein the witnesses, upon interrogation by counsel, testified before the Referee in Bankruptcy and as a part of Rule 52A on Federal rules of civil procedure and as a part of the rule regarding findings by the court is set forth that:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the Findings of Fact and conclusions of law appear therein."

The status of a "Referee in Bankruptcy," insofar as the force and effect of his Findings of Fact are concerned, is substantially that of a "master" whose findings are considered findings of District Court to the extent that the District Court adopts them. *Stewart v. Ganey* (C.C.A., Alabama, 1940) 116 F.(2d) 1010.

In the instant case the Referee, sitting as trial judge, set forth his Findings of Fact in detail, there being ten in number and four conclusions of law and the full Order on the Order to Show Cause directed to W. J. Earhart was "approved for entry" by attorneys for respondent Earhart on date of the hearing and "approved as to form" by Harold J. Shea, substituted attorney for respondent W. J. Earhart (R. 13 through 18). Objections to these findings were not made and

not brought to appellee's attention until receipt of a brief of appellant where Findings Nos. 3 and 4 (R. 14 and 15) were stated to be contrary to the evidence and for support of that statement only page 40 of the record wherein appellant himself testifies and exhibits No. 1 through 5 are used, all of which show the use of hindsight by the appellant in an effort to correct a faulty security transaction wherein appellant's funds were used to finance the procurement of alfalfa hay purchased for the purpose of feeding the Bankrupt's milch cows for the year 1953-54. As a matter of fact, these Findings are supported by the records on pages 23, 26, 27 and 28 as to Finding No. 3 and from the record on pages 39, 41, 55 and 57 as to Finding No. 4.

Trustee's Claim to Title of Property in Question Is Two-Fold.

On the one hand Trustee is vested with title of the Bankrupt herein on October 14, 1953, the date of filing of debtor's petition by operation of law. (Sec. 70a of the Chandler Act as amended to date 11 U.S.C.A., Sec. 110(a)). And on the other hand, the Trustee stands in the shoes and has the rights, remedies, and powers of a creditor then holding a lien on said hay by such proceeding, whether or not such a creditor actually exists (Sec. 70c of the Chandler Act as amended, 11 U.S.C.A., §110(c)). It is this second position which would nullify any particular advantage that appellant can gain by classifying the oral agreement (R. 40) with the Bankrupt, as one permitting appellant to have title to the hay and sell it to the Bankrupt on a thirty-day basis (R. 40) or at $200.00 a month (R. 55) on

conditional sales contract or mortgage. Remington's Revised Statutes, Sec. 3790, under laws of the State of Washington, provides in part as follows:

> "Conditional sales of personal property, or leases thereof containing a conditional right to purchase, when the property is placed in the possession of the vendee shall be absolute as to all bona fide purchasers, pledgees, mortgagees, encumbrancers, and subsequent creditors, whether or not such creditors have or claim a lien upon the property, unless within ten days after the taking possession by the vendee, a memorandum of the sale, stating its terms and conditions including the rate of interest and the purchase price exclusive of interest, insurance, and all other charges and signed by the vendor and vendee, is filed in the auditor's office of the County, wherein at the date of the vendee's taking possession of the property, the vendee resides * * *." (R.C.W. 63.12.010)

It is not anywhere questioned and the record shows that Felix Ivan Pugh had possession of the hay in question and that he could feed said hay to his milch cows and pay off the money advanced by W. J. Earhart in installments (R. 53, 54, 55).

On the other hand, if the transaction could conceivably be deemed an oral chattel mortgage wherein Felix Ivan Pugh agreed to pay the loan for purchase price of said hay with the hay to be security for said loan then that chattel mortgage would, of necessity, fall within the terms of Remington's Revised Statutes §3780, R.C.W. 61.04.020, which provides in part:

> "A chattel mortgage is void as against all existing and subsequent creditors of the mortgagor

> whether or not they have or claim a lien upon the property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith and without design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed, within ten days of the time of its execution, in the office of the auditor of the county in which the mortgaged property is situated * * *."

Therefore in the instant case, whether the oral agreement subsequent to the obtaining of possession of the hay by the Bankrupt was a conditional sale contract or a chattel mortgage, in either event said chattel mortgage or conditional sale contract not having been reduced to writing, and not having been filed, is null and void and the sale, if any, was considered absolute as to subsequent creditors and therefore as to the Trustee in Bankruptcy and testimony by the Bankrupt indicated existing and subsequent creditors to the time that the Bankrupt obtained possession of the hay in question (R. 59 and 60).

In the record at page 40 on the question of who purchased the hay Mr. W. J. Earhart's testimony on direct examination admits that on August 22nd Felix Pugh came to him and said, "I bought the hay." And in the subsequent question and answer his testimony is that he said to Mr. Pugh "You should not have bought the hay, I am buying that hay." Mr. Pugh testified that he had not received any notice from the Bank that his check had been presented and prior to the time that Mr. Walters, the vendor of the hay, took any action in regard to payment for said hay, Mr. Ear-

hart had presented his check to Mr. Walters and Mr. Walters tore up the Pugh check. On cross examination Mr. Earhart could not produce a bill of sale for said hay and it appeared that a cancelled check and a certain letter having no semblance of a bill of sale were considered by Mr. Earhart as a bill of sale. It is a fact that the weight slips for the hay were in the possession of Mr. Pugh who, in turn, gave them to Mr. Earhart and it is also interesting to note from the record on page 51 that Mr. Earhart saw a memorandum given by the vendor of the hay to Mr. Pugh and believed by Mr. Pugh to be a bill of sale (R. 23). Mr. Pugh testified that he received what he thought was a bill of sale from Mr. Walters and Mr. Earhart testified that he saw a receipt, he thought, but that it wasn't a bill of sale (R. 23). This answer came in an answer to his own counsel's question as whether or not Mr. Earhart ever had "it", (the bill of sale or a memorandum of the sale from Mr. Walters to Felix Ivan Pugh). It is clear that Mr. Pugh intended that title to the hay should pass to himself from Harry C. Walters (R. 28-29) but it is not clear as to whether or not Mr. Harry C. Walters considered the Earhart check payment of the Mr. Pugh's check or whether Mr. Walters in any sense of the word rescinded the sale to Mr. Pugh and thereafter sold to Mr. Earhart. The Referee made his findings of fact in reliance upon the testimony of Felix Ivan Pugh, that the Bankrupt had purchased the hay from Harry C. Walters and Findings 2, 3, 4, 5, 6, and 7, as supported by the record, are enough to establish title to the hay in Mr. Pugh at the outset and from Finding No. 6 the conclusion of law was reached that

the oral agreement between Harry C. Walters, Felix Ivan Pugh, and W. J. Earhart as to the payment of the debt due on the unpaid check written by Mr. Pugh constituted a novation wherein title was to vest in W. J. Earhart and as a part of said agreement there existed an oral security arrangement wherein Felix Ivan Pugh was to pay W. J. Earhart the purchase price of said hay on an installment basis (R. 15 and 16).

It is clear from the findings as supported by the record that title to the hay was in Pugh at the outset and that on a later agreement W. J. Earhart did acquire some interest in the hay which was null and void as to the Trustee having rights of a creditor.

Referee Has Jurisdiction to Enter Order

As to appellant's claim of lack of jurisdiction in the Bankruptcy Court it may be said in passing that the Bankruptcy Court may deal summarily with all property in its possession, actual or constructive. *In re Scranton Knitting Mills* (D.C. Penn. 1938) 21 F.Supp. 227, 36 American Bankruptcy Reports (N.S.) 662.

It is immaterial that a proceeding by the Trustee is denominated a summary proceeding when, in fact, it is a plenary proceeding where the case is within the jurisdiction of the court and the defendant answers and has ample opportunity of which it avails itself to be heard on the merits. *In re Eilers Music House* (C.C.A. Oregon, 1921) 274 Fed. 330; Certiorari denied: 42 S. Ct. 55, 257 U.S. 646, 66 L.ed. 414.

The objection that a proceeding was summary will be over-ruled where it appears that while the proceed-

ing was summary in form the whole of the facts were shown in a petition and answer. Under such circumstances the form of the proceeding was immaterial. *Board of Trade v. Johnson* (C.C.A., Ill. 1922) 283 Fed. 374, certiorari granted 1922, 43 S. Ct. 92, 260 U.S. 716, 66 L.ed. 478, and reversed on other grounds 1924, 44 S. Ct. 232, 264 U.S. 600, 68 L.ed. 869.

Under the decisions of the circuit courts of appeal and the Supreme Court of the United States, the test of jurisdiction to proceed in a summary way or by summary proceeding to determine controversies in regard to real or personal property is possession of such property in or by the Bankrupt at the time of the filing of the petition in adjudication. The finding must be and the facts must warrant the finding that the Bankrupt was true owner, and that he held as owner. *In re Logan* (D.C. N.Y. 1912) 196 Fed. 678.

Title 11 U.S.C.A., Section 66, states as follows: Referees are hereby invested, subject always to a review by the Judge, with the jurisdiction to * * * (6) perform such of the duties as are by this title conferred upon Courts of Bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or Orders of the Courts of Bankruptcy of their respective districts, except as here and otherwise provided.

Under a 1952 amendment to Title 11 U.S.C.A. Sec. 11(7) and Sec. 2a(7) of the Bankruptcy Act it is provided that a Court of Bankruptcy is invested with jurisdiction at law and in equity to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation

thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interest of the bankrupt's spouse and the property of any estate, * * *; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the Court of Bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion, or other pleading to which he is adverse, he shall be deemed to have presented to such jurisdiction."

It is submitted that when W. J. Earhart appeared and presented testimony and evidence in his defense and did not interpose objection to the summary jurisdiction of the Court of Bankruptcy he is deemed to have consented to such jurisdiction and cannot now complain that the Bankruptcy Court had no jurisdiction.

Facts Do Not Establish Bailment

In passing, the argument is made in appellant's brief that possibly the possession of the Bankrupt on date of adjudication could be explained away under the theory of bailment and in this regard, in view of the fact that it is admitted that the Bankrupt was to pay the purchase price for said hay in installments and in view of the fact that title to said hay is claimed by W. J. Earhart, it would be well to note that a discussion of conditional sale or bailment had in 17 A.L.R. 1434 cites therein a circuit court case quoted as follows:

> "It is not infrequently a matter of difficulty to accurately distinguish between the conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. * * * In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale; that there must be an agreement, expressed or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be payment for use of the thing let or bailed."

Union Stock Yards and Transit Company v. Western Land and Cattle Company (1893) 7 C.C.A. 660, 18 U. S. App. 438, 59 Fed. 49. Here there was an agreement to pay money for the thing delivered an earmark of a conditional sale as distinguished from bailment (*In re Galt* (1903) 56 C.C.A. 470, 120 Fed. 64) and in a case of *Morris v. Boston Music Company* (1915) 129 Minn. 198, L.R.A. 1917B 615, 151 N.W. 971, the court said:

> "Agreements are occasionally so drawn that it is difficult to determine whether they constitute a conditional sale or bailment; but there are certain distinguishing tests which usually make the matter clear. A sale contemplates that at some time the title shall pass to the vendee and that at some time in some manner he shall pay the purchase price. A bailment contemplates that the title shall not pass to the bailee but remain in the bailor and

> that the property shall be returned to the bailor or be disposed of as he shall direct."

It is submitted that in view of the above authorities the transaction as testified to by Mr. Felix Ivan Pugh and Mr. W. J. Earhart wherein Mr. Pugh was to use the hay in feeding his cows and to pay the purchase price in installments could not in any sense be a bailment and must therefore be a contract to sell or conditional sale contract, which, under the Trustee's alternative approach and the Referee's holding of novation as affirmed by the District Court Judge is considered absolute in view of the failure to record under laws of the State of Washington as to creditors and as to the Trustees in Bankruptcy herein.

Appellant's position regarding bailment has no support from the facts of the cases cited by appellant and they are not in point. In the *Ludvig v. American Woolen Company* case, 231 U.S. 522, there existed a written agreement whereby the Bankrupt agreed to carry out the agreement giving them the responsibility to sell merchandise in their possession to such persons as

> "they shall judge to be of good credit and business standing, and to collect for in behalf of the party of the first part [the bailor], all bills and accounts for the merchandise so sold, and to immediately pay over to said party of the first part [the bailor[any amount collected as aforesaid, immediately upon its collection, minus however the difference the price at which the said merchandise so collected for had been invoiced to the party of the second part, and the price at which said merchandise had been sold as aforesaid by the party of the second part."

In the next case of *Parlett v. Blake*, cited at 188 Fed. 200 there existed a Bankrupt agent for the sale of manufacturer's furniture and carpets wherein the Bankrupt kept goods on consignment until the termination of a fully written agreement regarding the sale of the merchandise in possession of the Bankrupt by the Bankrupt to third parties.

It is submitted that in the instant case there was nothing in the agreement between W. J. Earhart and Felix Ivan Pugh that permitted Mr. Pugh to process the hay or sell the hay or do anything to the hay except use it for feeding his cows and to pay back the purchase price for said hay which was advanced by the said W. J. Earhart.

In *In re Allee*, 55 F.(2d) 76, there was a question involved regarding the validity of a certain mortgage which explained the possession thereof by the Bankrupt and in that particular case the mortgage instrument was held to be valid as against the Trustee and the question of bailment was not involved nor is the case in point on Trustee's claim in the instant case that the agreement between W. J. Earhart and Felix Ivan Pugh regarding title to this hay being oral and unrecorded under laws of the State of Washington was invalid as to the Trustee in Bankruptcy herein for whether said agreement constituted a conditional sale contract or a chattel mortgage the recording and filing requirements were not met, therefore by law the instruments or agreements where no writing existed are null and void both under Sections 67 of the Bankruptcy Act and Section 70c.

CONCLUSION

The Trustee found the Bankrupt in possession of approximately 54 ton of hay. Upon inquiry the Bankrupt claimed the hay as his property freely admitting, however, that Mr. W. J. Earhart, a creditor in the estate, had advanced the money with which the purchase price for the hay was paid as well as the charges for delivering said hay to the farm operated by the Bankrupt. A full hearing affording all parties their day in court was had and the Referee in Bankruptcy as the Trial Judge, hearing and seeing all evidence presented, made his findings of fact and conclusions of law, fully supported by such testimony and other evidence as was presented. It is true that appellant tried unsuccessfully to reserve some security for the advancement of the purchase price for said hay but no mortgage nor conditional sale contract nor security instrument of any kind was filed with the Auditor of the County wherein the hay was located and wherein the Bankrupt resided as required by the laws of the State and such an agreement under State law was thereby rendered null and void as to subsequent creditors. Under the laws of the United States the Trustee in Bankruptcy is vested not only with whatever title was held by the Bankrupt on date of adjudication but with whatever rights existed in subsequent creditors or creditors holding a lien on said property. The possession of the hay by the Bankrupt could not, under the facts, fit the legal concept of bailment in that the Bankrupt was to use the hay in the feeding of his cows and was to pay the purchase price therefore. The findings and conclusions of the Referee

were affirmed by the District Court and are supported by the Record. Appellee respectfully submits that said Order should be affirmed.

Respectfully submitted,

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Attorney for Appellee.